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No. 87-1922

In the Supreme Court of the United States

OCTOBER TERM, 1988

NL INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's property, which was designed to transport nuclear fuel to and from a nuclear fuel reprocessing plant, was taken without just compensation when the Nuclear Regulatory Commission (Commission) did not grant an operating license for the reprocessing plant in the late 1970s.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 839 F.2d 1578. The opinion of the United States Claims Court (Pet. App. 16a-45a) is reported at 12 Cl. Ct. 391.

JURISDICTION

The judgment of the court of appeals (Pet. App. 91a) was entered on February 24, 1988. The petition for a writ of certiorari was filed on May 24, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1971, Allied General Nuclear Services (AGNS) began constructing a nuclear fuel reprocessing plant in Barnwell, South Carolina. AGNS hoped to take expended nuclear fuel from nuclear power plants and produce en-

riched uranium oxide that could be reintroduced into nuclear reactors. Petitioner contracted with AGNS to transport nuclear fuel to and from the Barnwell reprocessing plant. Nuclear material must be transported in shielded containers to prevent the escape of radiation. By 1977, petitioner had invested $15.5 million in the design and construction of transportation systems for the Barnwell plant. The Commission[1] granted petitioner the necessary licenses to operate its transportation systems. Pet. App. 19a-20a.

Under the Atomic Energy Act of 1954, 42 U.S.C. (& Supp. IV) 2011 *et seq.* (AEA), AGNS may not operate the Barnwell plant until it receives an operating license from the Commission. Throughout the 1970s, as the plant was being built, the Commission and others were concerned that nuclear fuel reprocessing plants might lead to the spread of nuclear weapons.[2] In 1977, at the request of President Carter, the Commission suspended licensing proceedings until two studies on nuclear fuel cycles could be completed (Pet. App. 21a). The Third Circuit upheld this action in *Westinghouse Elec. Corp.* v. *NRC*, 598 F.2d 759 (1979).[3] In 1980, after the two studies were published,

[1] The Atomic Energy Commission originally regulated the nuclear power industry. In 1975, it was succeeded in that function by the Nuclear Regulatory Commission. See 42 U.S.C. 5814(a), 5841(f). We use the word "Commission" to refer to either the Atomic Energy Commission or the Nuclear Regulatory Commission.

[2] When expended nuclear fuel is reprocessed, plutonium is separated from the radioactive waste. We fully explain the recycling process and the history of the licensing proceedings regarding the Barnwell plant in our brief in opposition in *Allied-General Nuclear Services* v. *United States*, No. 87-1902. We are serving petitioner a copy of our brief in that case.

[3] The Third Circuit based its decision on the ground that, under the AEA, the Commission may not issue an operating license if that license "would be inimical to the common defense and security or to the health and safety of the public" (42 U.S.C. 2133(d), 2134(d)).

the Commission sought public comments on whether it should reopen the licensing proceedings. Neither petitioner nor AGNS responded (Pet. App. 79a). And despite President Reagan's endorsement of commercial reprocessing in 1981, AGNS has not pursued its application for an operating license for the Barnwell plant (*id.* at 81a). Petitioner asserts that "the regulatory environment ha[s] changed so significantly that reprocessing [is] no longer viable" (Pet. 7).

2. Petitioner filed in the United States Claims Court this action alleging that the government has taken petitioner's property without just compensation (Pet. App. 22a). Petitioner alleges that its contract with AGNS and its nuclear fuel transport systems were rendered worthless by the Commission's decision to suspend licensing proceedings on the Barnwell plant in 1977 (*ibid.*).

The Claims Court granted the government's motion to dismiss petitioner's takings claim (Pet. App. 45a).[4] The court's decison rested in large part on its opinion in a companion case brought by AGNS (*id.* at 46a-87a). The court observed that petitioner was on notice that AGNS needed to obtain an operating license for the Barnwell plant from the Commission (*id.* at 29a). And the court held that the Commission acted in accordance with the AEA when it did not issue such a license in the late 1970s (*id.* at 23a). The court reasoned, therefore, that petitioner's property was not taken by government regulation because the "property was acquired, generated, and developed, well-within a preexisting regulatory scheme which subjected property to the possibility of the imposition of the limita-

[4] The Claims Court did not address petitioner's additional claim that the government breached an implied contract with petitioner. The court, however, certified its judgment for an immediate appeal.

tions now complained of" (*id.* at 33a). The Claims Court concluded: "private entrepreneurs were solely responsible for their ultimate decision to participate in this market; they alone would benefit financially from success and they alone must bear the monetary losses from their investment" (*ibid.*).

3. The court of appeals affirmed (Pet. App. 1a-2a). The court relied on its opinion in the companion case brought by AGNS. The court stated that petitioner's "claim is subject to the same infirmities as that of [AGNS], plus the added one that the act constituting the alleged taking had as its target [AGNS], not [petitioner], so [petitioner] is separated from it by an additional step" (*id.* at 2a). The court of appeals held that petitioner's claim, at bottom, is one for "frustration of a business by loss of a customer," which is "not a taking" (*ibid.*).

ARGUMENT

1. In our brief in opposition in *Allied-General Nuclear Services* v. *United States*, No. 87-1902, we explain that the Commission's actions did not constitute a taking of the Barnwell reprocessing plant. The Commission did not occupy, use, or in any manner take possession of the Barnwell plant. Rather, the Commission, following its mandate under the AEA, declined to issue AGNS an operating permit as the plant neared completion. But, as we explain in detail in our brief in *Allied-General Nuclear Services*, AGNS "willingly accepted that risk" when it constructed the plant. *Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 410 (1961).

Petitioner's takings claim is likewise without merit. When petitioner entered into a contract with AGNS to transport nuclear fuel to and from the Barnwell plant,

petitioner was aware that AGNS could not operate the plant without a license from the Commission. Thus, petitioner built the transportation systems while it was fully "aware of the conditions under which" AGNS could perform the contract. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1007 (1984). One of those conditions—the issuance of an operating license—was not fulfilled and petitioner claims that it lost its investment. But the government never promised either petitioner or AGNS that the Commission would issue AGNS an operating license. Accordingly, petitioner "could not have had a reasonable, investment-backed expectation that" the Commission would permit the Barnwell plant to operate soon enough or long enough so that petitioner could make a profit on its investment (*id.* at 1006).

Indeed, as the Claims Court noted (Pet. App. 35a-36a), the value of petitioner's investment depended on many conditions in addition to the Commission's issuance of a license. For example, AGNS might not have found sufficient customers to make operation of the plant profitable. Or AGNS might have sold the Barnwell plant to a party that is not bound to use petitioner's transportation services. In short, petitioner's investment was "subject to the vagaries of the industry itself" (*id.* at 36a (footnote omitted));[5] thus, the poor outcome of petitioner's investment hardly amounts to a governmental taking of its property.

2. Contrary to petitioner's contention (Pet. 10, 14-15), *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312 (1893), and *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), do not support petitioner's claim that its property was taken because the government allegedly encour-

[5] Indeed, even though President Reagan has endorsed commercial reprocessing, AGNS apparently abandoned the Barnwell project for economic reasons (87-1481 Gov't C.A. App. 317).

aged it to enter the reprocessing industry. In *Monongahela Navigation Co.*, there was no dispute that the government had taken private property; the United States condemned and appropriated a lock and a dam owned by the Monongahela Company. See 148 U.S. at 324. The issue was the amount of proper compensation. In resolving that question, the Court simply noted that the United States had invited construction of the structures and thus had no basis for claiming that the lock and dam were "wrongfully there" (*id.* at 335).

In *Kaiser Aetna*, the government imposed a right of public access to a privately owned pond, which had been improved with the consent of the government. This Court held that the government's creation of a right of public access was a taking because the "right to exclude" is "a fundamental element of the property right" (444 U.S. at 179-180 (footnote omitted)). Accord *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). Here, by contrast, petitioners do not claim that the government has granted others the right to use petitioner's property.

3. Lastly, petitioner contends (Pet. 2, 17) that the government took petitioner's rights under its contract with AGNS. This argument is foreclosed by the Court's decision in *Omnia Co.* v. *United States*, 261 U.S. 502 (1923). In that case, the United States required a steel company to sell all of its steel to the government. Accordingly, the steel company was unable to perform its contract with Omnia Company. The Court rejected Omnia Company's Fifth Amendment claim that the United States took Omnia's rights under the contract. The Court observed that the contract "was not appropriated but ended" (*id.* at 511). The Court noted that a taking might have occurred if the government had kept the contract "alive for the use of the Government" (*id.* at 513). But the Court held that "[f]rustration and appropriation are essentially different

things" (*ibid.*). Similarly, in this case the government has not appropriated petitioner's contractual right to receive compensation for transporting nuclear fuel to and from the Barnwell plant. Rather, petitioner merely alleges that it has suffered losses because its contractual rights have been frustrated. The Fifth Amendment does not require the government to pay for those losses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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